

Small Business Notes

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U.S. Supreme Court Holds That Some .Com Domain Names Can Have Trademark Protection

Trademarks are a valuable way to brand a business and identify its products to consumers. Federal law (the Lanham Act) does not permit trademark registration of purely generic terms (e.g., house, wine, store) but requires that trademarks be “distinctive” to allow for registration. The Internet hotel booking service Booking.com sought to register its name as a trademark; the Patent and Trademark Office refused on the basis that “booking” was a generic term and the addition of “.com” did not change the term’s generic character. Two lower courts found for Booking.com and the Patent and Trademark Office appealed to the Supreme Court.

Writing for the 8-1 majority, Justice Ginsburg noted that the Patent and Trademark Office’s position would make “Booking.com” a synonym for “booking” and that one could then have a situation where a consumer could ask a question like “what is your favorite Booking.com.” Instead, Booking.com introduced evidence that the public perceived Booking.com as a particular brand or company conducting online bookings of hotel reservations, and the Court held that the mark was distinctive enough in consumer’s eyes to be descriptive of the particular business Booking.com. The Court’s decision went for registration of Booking.com.

In his dissent, Justice Breyer noted that the Court’s position led to the conclusion that any generic mark when combined with .com could be transformed into a distinctive mark if one did enough advertising of the mark: e.g. washingmachine.com could be transformed into a distinctive mark even though all that changed was the consumer’s association of the term and not the term itself.

The case is Patent and Trademark Office v. Booking.com B.V , Docket 19-46, June 30, 2020.

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Important Information for Reopening and Returning to Work: CDC Adds New Conditions for COVID-19 Risk

On June 25, 2020 the CDC removed individuals over 65 years of age as a single category of COVID-19 risk and instead noted that risk increases with age but does not suddenly increase at age 65. The CDC also updated its list of underlying medical conditions that put individuals at higher risk of severe COVID-19 illness to now include:

- Chronic kidney disease
- Chronic obstructive pulmonary disease
- Obesity
- A weakened immune system from solid organ transplant
- Serious heart conditions such as heart failure, coronary artery disease, cardiomyopathy
- Sick cell disease
- Type 2 diabetes
- Neurologic, genetic, metabolic conditions in children
- The new list also identifies conditions which have the potential to increase the risk of severe COVID-19 illness:
 - Asthma
 - Cerebrovascular disease
 - Cystic fibrosis
 - Neurologic disease such as dementia
 - Hypertension
 - Weakened immune system from bone marrow transplants or medications like corticosteroids
 - Liver disease
 - Pregnancy
 - Damaged or scarred lung tissue
 - Smoking
 - The blood disorder Thalassemia
 - Type 1 diabetes

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Important Reminder: PPP Flexibility Act Broadens Deferral of Employer's Share of Social Security Tax

Section 2302 of the original CARES Act provided that an employer could defer payment of the employer's share of Social Security taxes incurred between March 27, 2020 and December 31, 2020 by depositing 50 percent of the deferred amount by December 31, 2021 and the remaining 50 percent by December 31, 2022. However, the Act excluded employers from the deferral of deposit of taxes after employers had been notified that its PPP loan had been fully or partially forgiven.

The PPP Flexibility Act (enacted June 5, 2020) removed that exclusion. The deferral is now available to all employers.

U.S. Department of Labor Seeks Comments on Potential Changes to Family and Medical Leave Act (FMLA)

Noting the need to update the FMLA and its regulations to reflect changes in workplaces and in demographics, the U.S. Department of Labor has published a Request for Public Comments on current issues for both employers and employees that might drive future changes to the FMLA. [85 FR 43513, July 17, 2020]. See the text at [U.S. Dept. of Labor, Wage and Hour Division](#).

The request seeks comment in four main areas:

1. The definition of "serious health condition." What are the challenges for employers in applying the extensive definitions of the Act? What are the experiences of employees who have had an employer deny coverage under the Act for a condition the employees believe is covered?
2. What are issues for both employers and employees regarding intermittent use of FMLA leave—especially in cases where the timing of intermittent use is not foreseeable?
3. The requirement of notice to be given to the employer. Do employers find that employee notice contain enough information to make a coverage judgment? Are employees aware of the procedural requirements for providing notice?
4. Required medical certifications. Are the forms presently used to obtain certifications giving adequate information to enable judgements on return to work?

The Department of Labor asks in the Request for both examples of how employers and employees are affected by these issues and for suggestions for improvement.

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